U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 June 2004

BALCA Case No.: 2003-INA-108
ETA Case No.: P2000-CA-09508768/ML

In the Matter of:

STAFFING SERVICES, INC.,
Employer,

on behalf of

MARIA MUNOZ-LEYVA,
Alien.

Appearances: W. Kenneth Teebken, Esquire
La Mirada, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by a staffing services company for the position of Packer. (AF 27-28).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification, together with the Employer's request for review, as contained in the Appeal File ("AF") and written arguments of the parties. 20 C.F.R. § 656.27(c).

[1] Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File."

STATEMENT OF THE CASE

On December 28, 1999, the Employer, Staffing Services, Inc., filed an application for alien employment certification on behalf of the Alien, Maria Teresa Munoz-Leyva, to fill the position of Packer. Minimum requirements for the position were listed as two years experience in the job offered. (AF 27-28).

An Assessment Notice was issued by the local office on March 21, 2000, citing the Employer's wage offer as below the prevailing wage, questioning the Alien's experience, and finding the Employer's two years experience requirement excessive. The Dictionary of Occupational Titles' ("DOT") requirement for the position (DOT Code 920.587-018, Packager, Hand) was "beyond a short demonstration up to 30 days." (AF 46-51). The Employer responded by documenting the Alien's experience, amending its wage offer and attempting to document business necessity for its experience requirement based upon the need to ensure no damage loss. (AF 35-36).

The Employer received four applicant referrals in response to its recruitment efforts, all of whom were rejected by the Employer. (AF 42).

A Notice of Findings ("NOF") was issued by the CO on July 25, 2002, proposing to deny labor certification based upon findings of a restrictive requirement, that the Alien lacked the two-year experience requirement at the time of hire, and an insufficient recruitment effort. (AF 22-25). The CO found that the Employer's experience requirement was excessive, in light of the Specific Vocational Preparation ("SVP") time of "up to thirty days" found in the DOT. The Employer was instructed to either amend the restrictive requirement or to justify its business necessity. The CO further questioned whether the Employer's contact of the four qualified applicants took place timely, if at all, noting that positive contact efforts include both attempts in writing (supported by dated return receipts) and by telephone (supported by phone bills). The Employer was instructed to submit details of its attempt(s) to interview the U.S. applicants.

In Rebuttal, the Employer submitted that its two-year experience requirement was justified in order to prevent damage in packaging, but stated that if necessary, it would delete the requirement and re-advertise. The Employer also submitted documentation of the Alien's experience. With respect to the recruitment effort, the Employer reported contact with each of the four applicants and stated that three applicants confirmed their interview appointments but failed to appear, while the fourth applicant indicated that she was not interested in the job. (AF 15-21).

A Final Determination ("FD") denying labor certification was issued by the CO on October 31, 2002,[3] based upon a finding that the Employer had failed to adequately respond to both the restrictive requirement and insufficient recruitment report findings. (AF 8-9). The CO found that the Employer's argument about the need for careful workers was insufficient to support the two-year experience requirement, and further noted that the Employer had failed to provide the amendment letter reducing the experience requirement. The CO found the Employer's rebuttal lacking with respect to the insufficient recruitment effort in that the Employer did not adequately document a timely, good-faith recruitment effort, despite the CO's request for documentation.

The Employer filed a Request for Review by letter dated November 26, 2002, and the matter was referred to this Office and docketed on February 20, 2003. (AF 1-7). The Employer filed an Appeal Brief on May 1, 2003.

DISCUSSION

Twenty C.F.R. § 656.21(b)(6) states that the employer is required to document that if U.S. workers have applied for a job opportunity offered to an alien, they may be rejected solely for lawful job related reasons. This regulation applies not only to an employer's formal rejection of an applicant, but also to a rejection which occurs because

[3] The Employer was notified by letter dated September 6, 2002 that the NOF was going to automatically become the final decision of the Secretary of Labor denying labor certification because the Employer had failed to sign the Rebuttal to the NOF. (AF 13-14). The Employer responded that his assistant had full authority to sign on the Employer's behalf; the Employer's Rebuttal was then accepted and considered on its merits. (AF 8-12).

of actions taken by the employer. Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.,* 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

The burden of proof is on the employer in an alien labor certification. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant,* 1996-INA-64 (May 15, 1997); *Marsha Edelman,* 1994-INA-537 (Mar. 1, 1996). Thus, it is the employer's burden to demonstrate good faith in recruitment and to show that U.S. workers are not able, willing, qualified or available for this job opportunity.

In this case, the CO challenged the Employer's good faith recruitment of U.S. workers. The Employer made little effort to document its recruitment efforts and to show that it recruited in good faith. All of the applicants were rejected by the Employer on the basis that they were unavailable for the job; the Employer stated that three applicants did not appear for a scheduled interview. The Employer was specifically instructed in the NOF to document its contact of these applicants, but did not present documentation of actual contact. In rebuttal, the Employer reported that contact was by phone and/or mail, and simply stated in all three cases, "[the applicant] confirmed [his/her] appointment, but [he/she] did not show up nor did [he/she] call to reschedule." (AF 15-18). The Employer provided copies of the letters sent; however, the letters were unsigned and there was no documentation that the letters were actually sent or received. (AF 19-21). Similarly, the Employer provided no specifics as to date or time of the phone calls allegedly made. (AF 15-21).

Although a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001)(*en banc*); *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). To document initial or follow-up telephone conversations, the Board in *M.N. Auto Electric, supra,* instructed

> an employer must, at a minimum, keep reasonably detailed notes on the conversation (*e.g.,* when the call was made, how long it lasted, whether there was a successful contact with the applicant, the substance of the conversation. Pre-prepared checklists may be helpful in documenting what was discussed with the applicants). Where available, phone records showing the time and duration of the phone contacts should be submitted by Employer.

The Board further noted that although records of local phone calls may not always be available upon request from the telephone company, an employer should be prepared to document that it had requested these records from the phone company in a timely fashion. *Id.*

The Employer reported that the three applicants purportedly contacted by the Employer failed to appear for their scheduled interviews. In light of this fact, the CO requested that the Employer provide documentation of contact, specifically telephone bills. The Employer made no effort to provide further documentation, and instead simply resubmitted the information stated in the recruitment report. The Employer presented only a copy of an unsigned letter with no accompanying postmark or proof of mailing. The Employer did not submit any telephone bills or records or any documentation that same had been requested from the telephone company. The Employer relied solely on its unsupported assertions of attempted contact. *See, e.g., Medical Designs, Inc.,* 1988-INA-159 (Dec. 19, 1988)(*en banc*)(inadequacy of such documentation).

On this basis, the Employer has not met its burden to show that U.S. workers are not able, willing, qualified or available for this job opportunity, and accordingly, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.